(2)

NO. 91-37

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October 1991 Term

IN RE:

LONTIE J. CLEMENCE AND KAREN K. CLEMENCE, INDIVIDUALLY AND IN THEIR SEVERABLE CAPACITIES AS STOCKHOLDERS OF AND TRUSTEES FOR "THE BONNIE J. CLEMENCE TRUST, UTA 7/25/84"; BONNIE J. CLEMENCE, INDIVIDUALLY AND IN HER CAPACITY AS STOCKHOLDER OF "THE BONNIE J. CLEMENCE TRUST UTA 7/25/84"

Plaintiffs/Petitioners,

vs.

ROY ARTHUR CLEMENCE, CONSERVATEE/DEBTOR CHARLES R. CLEMENCE AND R. DOUGLAS CLEMENCE, CO-CONSERVATORS FOR ROY A. CLEMENCE,

Defendants/Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Tenth Circuit properly affirm the lower courts' ruling that the issues in this case "have already been determined by this Court [Bankruptcy] and the United States District Court for the District of Kansas and therefore are barred by res judicata and collateral estoppel?"

II. Can petitioners raise the constitutionality of 10th Cir. R. 34.1.9 for the first time in their petition for a writ of certiorari; and if so, is it constitutional?

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1. Clemence v. Clemence, 930 F.2d 32 (10th Cir. 1991).

2. Clemence v. Clemence, No. 86-4091-R (D. Kan. January 12, 1990).

3. Clemence v. Clemence, (In Re: Roy Arthur Clemence), No. 85-0278 (Bankr. Kan. January 24, 1986).

RELATED FEDERAL CASES

4. Citizens State Bank of Abilene v. Clemence, No. 84-2079 (10th Cir. April 28, 1987).

5. Citizens State Bank of Abilene v. Clemence, No. 84-4256 (D.Kan. July 16, 1984).

6. Citizens State Bank of Abilene v. Clemence, Nos. 83-0232 and 83-0233, and Clemence v. Clemence, Nos. 83-0291 and 83-0292 (Bankr. Kan. February 24, 1984).

RELATED STATE CASE

7. Clemence v. Clemence, No. 82-D-63 (Dickinson County, Kan. June 19, 1984)

All of the above referenced cases are included in the attached appendix.

STATEMENT OF THE GROUNDS OF JURISDICTION

The Clemence litigation began in the bankruptcies of Karen and Lontie Clemence. That prong of the litigation ended in the United States Court of Appeal for the Tenth Circuit in an order dated April 28, 1987. The case before this Court was initially an adversary proceeding within the bankruptcy of Roy Clemence. The bankruptcy court's ruling in the adversary proceeding was appealed to the United States District Court for the District of Kansas. The district court's appellate decision was then appealed to the United States Court of Appeals for the Tenth Circuit. The decision of the United States Court of Appeals for the Tenth Circuit was entered on February 22, 1991.

Petitioner's initial petition for a writ of certiorari was filed on May 23, 1991. A corrected copy of that petition was filed on July 1, 1991. The petition for a writ of

certiorari was first actually received by respondents on July 15, 1991, having been mailed by priority mail on Saturday, July 13, 1991.

Therefore, jurisdiction is based on 28 U.S.C. § 1254 and Sup. Ct. R. 13.1. By raising an issue never raised prior to the petition for a writ of certiorari (constitutionality of 10th Cir. R. 34.1.9), it appears petitioners are also attempting to invoke the original jurisdiction of the Court under 28 U.S.C. § 1251.

CONSTITUTIONAL PROVISIONS AND STATUTES POTENTIALLY AT ISSUE:

1. U.S. Const. amend. V:

Amendment V - Grand jury indictment for capital crimes; double jeopardy; self-incrimination; due process of law; just compensation for property.

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

2. 28 U.S.C. § 2072:

Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof, and courts of appeals).

(b) Such rules shall not abridge, enlarge, or modify any substantive right. All laws in conflict with such rules

shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

3. 28 U.S.C. § 1251:

Original jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

STATEMENT OF THE CASE

Petitioner Bonnie Clemence is the mother of petitioners Lontie and Karen Clemence. Roy Clemence was the husband of Bonnie and the father of Lontie and Karen Clemence. Roy was also the father of the respondents, Charles and Douglas Clemence, from a previous marriage.

The initial question at issue in the Clemence litigation was whether a general warranty deed from Bonnie to Lontie and Karen dated May 19, 1982, actually conveyed an interest in 5,000 acres of Kansas real estate. That issue has been litigated in some form or another in seven actions:

Case No.	Court	Date Decision	Pages
83-0232 & 83-0233 and 83-0291 & 83-0290	Bankruptcy Court (Karen and Lontie)	2-24-84	1-19
82-D-63	District Court of Dickinson County, Kan. Roy and Bonnie)	6-19-84	20-33
84-4256	District Court (Karen and Lontie)	7-16-84	34-37
85-0278	Bankruptcy Court (Roy)	1-24-86	38-42
84-2079	10th Circuit (Karen and Lontie)	4-28-87	43-44
86-4091	District Court (Roy)	1-12-90	45-48
90-3049	10th Circuit (Roy)	2-22-91	49-54

The second issue, which is the issue before this Court, is whether petitioners should have been allowed to resurrect that issue in an adversary action in the bankruptcy of Roy Clemence. Although it is only the second issue which is before this Court, the entire history of the litigation is discussed herein because the doctrines of res judicata and collateral estoppel are involved.

The initial issue was litigated in bankruptcies filed by Karen and Lontie Clemence. During those bankruptcies, the District Court of Dickinson County, Kansas issued a decree of divorce in an action between Roy and Bonnie Clemence.

The bankruptcy court issued an opinion which contained the following:

> Therefore, the Court holds the transfer of the real estate to Karen and Lontie on May 19, 1982 was not an effective gift, because it lacked, and Karen and Lontie failed to prove, the requisite elements of a gift. Even if the burden of proof in this case was on Roy and the creditors, as Karen and Lontie argue, the Court would hold that Roy and the creditors have proved that a valid gift was not made. The Court holds there was no intent to make a transfer nor was there an effective transfer before June 10, 1982. At that point, Bonnie was enjoined from transferring the property in any manner by the restraining order issued by the state court judge in the domestic relations actions. Accordingly, the Court holds that the owner of the real estate is the Bonnie Clemence Trust and not the debtors in this Chapter 11 proceeding, Karen and Lontie Clemence.

Clemence v. Clemence, Memorandum of Decision, Nos. 83-0291 and 83-0292 (Bankr. Kan. February 24, 1984) at 18. Appendix at 36-37. The

bankruptcy court based its decision on the elements of a gift as required by Kansas law. Appendix at 15-16.

The District Court for Dickinson County decreed that the 5,000 acres in question would be awarded as follows:

> Should the aforesaid deed [May 19, 1982] be finally determined to be invalid, it is the finding of this Court that the ownership of all lands described therein as well as the other lands described in the aforesaid exhibit A should be set over to the Plaintiff as his sole and separate property, free and clear of all claims of the Defendant. Should the deed be finally determined to be valid, then this finding shall have no bearing on the lands described therein.

Clemence v. Clemence, Case No. 82-D-63, Decree of Divorce, (Dickinson County, June 19, 1984) at 2-3. Appendix at 45-46.

There was no appeal of the decree of divorce in the Dickinson County, Kansas action. However, the bankruptcy decision was

appealed to the district court and Tenth Circuit, both of which affirmed the lower court.

The issue was raised in the Roy Clemence bankruptcy through an adversary proceeding brought by Lontie, Karen and Bonnie Clemence. Respondents filed a motion to dismiss because the issue had already been decided. The first order generated in that bankruptcy was a concise order granting the motion to dismiss, wherein the bankruptcy court ruled:

> Upon hearing statements of the parties and upon consideration of the evidence, the court finds that defendants' motion to Dismiss should be granted on the grounds that the claims and issues presented in plaintiff's Complaint have already been determined by this Court and therefore are barred by res judicata and collateral estoppel.

Clemence v. Clemence, Order, No. 85-0278 (Bankr. Kan. January 24, 1986) at 2. Appendix at 82.

That decision was appealed to the district court, which affirmed. Appendix at 37. The district court decision was appealed to the Tenth Circuit, which held:

> On appeal, the district court affirmed. The court held that contrary to plaintiffs' assertion, it did determine Bonnie's deed invalid. The court stated:
>
> > While the court did not explicitly state that the deed was invalid, the court held the deed was ineffective (or invalid) to transfer interest in the land to Karen and Lontie Clemence because there was an absence of donative intent, delivery and acceptance -- the essential elements of a gift. This holding satisfied the condition in the divorce decree because it established the ownership of the land at the time of the decree.

> **We agree with this ruling. Plaintiffs' contention is utterly frivolous.**

Clemence v. Clemence, Order and Judgment, No. 90-3049 (10th Cir. February 22, 1991) at 5-6 (emphasis added). Appendix at 103-04.

Petitioners are now asking this Court to grant their petition for a writ of certiorari to review this matter.

SUMMARY OF RESPONDENTS' ARGUMENT

Petitioners' have filed a petition for a writ of certiorari, asking this Court to exercise its discretion to review this matter. However, petitioners have failed to state any special or important reasons which would justify this Court accepting this generic case for review. This case does not involve a conflict of decisions, or a departure from the accepted and usual course of judicial proceedings. Further, the only state decision in any way related to this case was the state court divorce decree stating it would abide by the bankruptcy court's ruling. Certainly, there is no important question of federal law involved. Beaulieu v. United States, ____ U.S. _____, 110 S.Ct. 3302, 111 L.Ed. 2d 811 (1990) (White, J., dissenting); Sup. Ct. R. 10.

The initial issue involved was whether a deed conveyed an interest, or was an effort to avoid creditors. All courts have ruled it did

not convey any interest, and was to avoid creditors. That issue was a question of state law. Next, the courts were asked to decide if that issue could be raised in subsequent litigation. All of the courts agreed it could not, because of res judicata and collateral estoppel.

These issues are not the type which justify or require this Court to grant a petition for a writ of certiorari.

The issue of 10th Cir. R. 34.1.9, and/or Fed. R. App. P. 34(a), regarding oral argument, was not raised prior to the petition for a writ of certiorari, and is not a matter over which this Court has original jurisdiction.

ARGUMENTS OF RESPONDENTS

I. Did the Tenth Circuit properly affirm the lower court's ruling that the issues in this case "have already been determined by this Court [Bankruptcy] and the United States District Court for the District of Kansas and therefore are barred by res judicata and collateral estoppel?"

This case involves facts and law which have been presented and ruled upon on six different occasions by federal courts, two times each by the bankruptcy court, district court, and Tenth Circuit, and on one occasion by a state court.

There are seven orders or decisions which serve as the foundation for this Court's consideration of a petition for a writ of certiorari. They are as follows:

1. February 24, 1984 - Memorandum of Decision in the bankruptcies of Karen and Lontie Clemence.

2. February 19, 1984 - Decree of Divorce in the matter of Roy and Bonnie Clemence in state court.

3. July 16, 1984 - Order from the district court in the Karen and Lontie Clemence bankruptcy.

4. January 24, 1986 - Order from the bankruptcy court in the Roy Clemence bankruptcy.

5. April 28, 1987 - Order and Judgment from the Tenth Circuit in the Karen and Lontie Clemence bankruptcies.

6. January 12, 1990 - Order from the district court in the Roy Clemence bankruptcy.

7. February 22, 1991 - Order and Judgment from the Tenth Circuit in the Roy Clemence bankruptcy.

All of the above-referenced orders or decisions are included in the appendix attached hereto and incorporated herein.

A more complete list of relevant events is as follows:

A. May 19, 1982 - Deed to Lontie and Karen Clemence.

B. June 10, 1982 - Roy Clemence filed an action for separate maintenance against Bonnie Clemence, which was later amended to request a divorce.

C. July 29, 1982 - Bonnie Clemence filed Chapter 11 bankruptcy.

D. March 28, 1983 - Bankruptcy Judge Pusateri dismissed Bonnie Clemence's bankruptcy.

E. April 18, 1983 - Karen and Lontie Clemence filed pro se Chapter 11 bankruptcies.

F. April 25, 1983 - May 19, 1982 deed filed of record for first time.

G. February 24, 1984 - Judge Pusateri issued a decision in the Karen and Lontie Clemence bankruptcies.

H. June 19, 1984 - State district court judge entered a divorce decree.

I. July 16, 1984 - U. S. District Court Judge Rogers issued a decision affirming Judge Pusateri's decision in the Karen and Lontie Clemence bankruptcies.

J. February 12, 1985 - Roy Clemence filed bankruptcy.

K. December 9, 1985 - Petitioners filed complaint for declaratory judgment in the Roy Clemence bankruptcy.

L. December 27, 1985 - Respondents filed a motion to dismiss the adversary complaint.

M. January 24, 1986 - Judge Pusateri granted the motion to dismiss.

N. March 6, 1986 - A motion for rehearing regarding the motion to dismiss was denied.

O. April 28, 1987 - Tenth Circuit affirmed Judge Rogers' decision in the Karen and Lontie Clemence bankruptcies.

P. March 10, 1988 - Order filed confirming the plan in the bankruptcy of Roy Clemence.

Q. September 4, 1988 - Roy Clemence died.

R. January 12, 1990 - Judge Rogers affirmed the bankruptcy court's dismissal of the adversary complaint.

S. February 22, 1991 - Tenth Circuit affirmed Judge Rogers' decision that the bankruptcy court was correct in dismissing the adversary complaint.

Bonnie executed a general warranty deed to Lontie and Karen dated May 19, 1982, purporting to convey the 5,000 acres to them as a gift. The deed was not recorded until nearly one year later on April 25, 1983. In the intervening months, many events occurred.

On June 10, 1982, Roy filed an action in state court (Case No. 82-D-63) first seeking separate maintenance and later seeking a divorce from Bonnie.

On April 18, 1983, Lontie and Karen filed Chapter 11 bankruptcies. In adversary proceedings within these bankruptcies (Case Nos. 83-0291 and 83-0292), the bankruptcy judge determined that Bonnie did not have donative intent to convey the property to Lontie and Karen when she executed the deed. The bankruptcy judge held: "nor was there an effective transfer before June 10, 1982." Appendix at 36. That date was the date the state court obtained jurisdiction over Roy and Bonnie pursuant to the action filed for separate maintenance. Also, that date began the period when Bonnie was enjoined by the state court from conveying any interest in the property. Appendix at 36-37.

The bankruptcy judge concluded that the real property was owned by the Bonnie Clemence Trust, and not Lontie and Karen. Appendix at 37. The bankruptcy court's ruling was then appealed to the United States District Court for the District of Kansas (Case No. 84-4256),

which affirmed the bankruptcy court. Appendix at 80. The district court decision was then appealed to the United States Court of Appeals for the Tenth Circuit (Case No. 84-2079), which affirmed the district court. Appendix at 89.

After the bankruptcy court had issued its ruling in the bankruptcies of Karen and Lontie, jurisdiction to divide the 5,000 acres was returned to the state court. The state court then entered a decree of divorce, with the property being awarded to Roy, subject to a final determination regarding the validity of the deed executed on May 19, 1982. The state court held that if the deed was ultimately held to be invalid, then Roy would receive the property as his sole and separate property. If the deed was finally determined to be valid, then the property would be conveyed pursuant to the deed, and Roy would not be an owner. Appendix at 45-46.

It was for the bankruptcy court in the bankruptcy of Karen and Lontie Clemence to determine whether the deed was valid, and if the deed was held to be invalid or ineffective, the 5,000 acres was to be awarded to Roy in the divorce proceeding. Appendix at 45-46.

On February 12, 1985, Roy filed bankruptcy. It is Roy's bankruptcy which is the root of the petition for a writ of certiorari. The issue as raised in the bankruptcy of Karen and Lontie Clemence ended with the order and judgment issued by the United States Court of Appeals for the Tenth Circuit in Case No. 84-2079 on April 28, 1987. Appendix at 88. Within Roy's bankruptcy, Lontie, Karen, and Bonnie filed an adversary proceeding (Case No. 85-0278) requesting a declaratory judgment that the 5,000 acres at issue did not constitute property of Roy's bankruptcy estate.

Lontie, Karen, and Bonnie focused on the fact the bankruptcy court did not literally use the word "invalid," but rather held the transfer was not effective. Appendix at 95. The respondents filed a motion to dismiss on the basis that the matter had previously been resolved in favor of Roy Clemence by the bankruptcy court, district court, and Tenth Circuit. The motion to dismiss was granted in an order dated January 24, 1986 and filed on January 30, 1986. Appendix at 81. Petitioners filed a motion for rehearing, which was denied on or about March 6, 1986. Appendix at 84. They then appealed to the United States District Court for the District of Kansas (Case No. 86-4091), which affirmed the bankruptcy court's dismissal of the adversary proceeding in an order dated and filed January 12, 1990. Appendix at 96. Petitioners then appealed to the United States Court of Appeals for the Tenth Circuit (Case No. 90-3049), which affirmed the district

court on February 22, 1991 in an unpublished decision cited at 930 F.2d 32 (10th Cir. 1991) (Table). Appendix at 104.

The Tenth Circuit properly reviewed the actions of the district court, which had analyzed not only the proceedings in the Roy Clemence bankruptcy but also re-evaluated the proceedings in the Karen and Lontie Clemence bankruptcies, in deciding that the adversary proceeding at the root of this matter was barred by res judicata and collateral estoppel. Appendix at 92-93 and 104.

The courts have consistently seen through the smoke screens created by the petitioners and focused on the facts of this case. Based on those facts, the courts have consistently held that the deed did not transfer any interest to Karen and Lontie, and that petitioners should not be able to resurrect that issue in the Roy Clemence bankruptcy.

This is not a case which meets the considerations set out in Sup. Ct. R. 10, and the petition for a writ of certiorari should be denied.

II. Can petitioners raise the constitutionality of 10th Cir. R. 34.1.9 for the first time in their petition for a writ of certiorari; and if so, is it constitutional?

Petitioners attempt to raise the constitutionality of 10th Cir. R. 34.1.9 for the first time in their petition for a writ of certiorari. The fact the issue was not previously raised is illustrated by the language in the Tenth Circuit opinion:

> The sole issue is whether the bankruptcy court correctly dismissed an adversary proceeding brought to determine whether 5,000 acres of real property was that of the plaintiffs or that of the estate.

Clemence v. Clemence, Order and Judgment, No. 90-3049 (10th Cir. February 22, 1991) at 2. Appendix at 98.

The Tenth Circuit has merely adopted the language of Federal Rule of Appellate Procedure 34(a) as its rule. Fed. R. App. P. 34(a) states:

> Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rules shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:
>
> > Oral argument will be allowed unless
> > (1) the appeal is frivolous; or

> (2) the dispositive issue or set of issues has been recently authoritatively decided; or
>
> (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Id.

The Tenth Circuit rule is set out in 10th Cir. R. 34.1.9:

> (a) To expedite final disposition of pending cases, the chief judge may designate panels of three judges to review pending cases at any time before oral argument and submission to determine whether oral argument is needed. Cases may be referred to these panels on the court's own motion or on motion or stipulation of the parties.
>
> (b) The clerk shall maintain a list of all cases that have been referred to a three-judge panel pursuant to

> subsection (a) of this rule. Appropriate notice of the order of reference will be made by the clerk to all parties. Except when the order of reference has been made with the consent of all parties, any party may, within seven days of that order, file with the court a statement of reasons for argument.
>
> (c) Oral argument will be allowed in all cases unless a panel of three judges, after examination of the briefs and records, shall be unanimously of the opinion that oral argument is not needed. A panel will utilize criteria that favor oral argument unless it concludes that the appeal is (1) frivolous; or (2) the dispositive issue or set of issues has been authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be aided significantly by oral argument.

Id.

Petitioners never requested oral argument, and the Tenth Circuit rule complies with the Federal Rules of Appellate Procedure established by this Court, as allowed by 28 U.S.C. § 2072. Also, this is not the type of case over which this Court has original jurisdiction, as established by 28 U.S.C. § 1251.

Obviously, this Court is able to review and modify any rules it has issued without having to review them pursuant to a petition for a writ of certiorari, and it should not serve as a basis for the granting of this petition.

CONCLUSION

The issue of whether Bonnie Clemence transferred any interest to Lontie and Karen Clemence by the deed dated May 19, 1982 has been the subject of decisions by the United States Bankruptcy Court for the District of Kansas, the United States District Court for

the District of Kansas and the United States Court of Appeals for the Tenth Circuit in the Karen and Lontie Clemence bankruptcies. Additionally, the United States District Court for the District of Kansas re-evaluated those decisions when it addressed the appeal in the Roy Clemence bankruptcy. That issue involved the application of black letter law regarding the elements of a gift to the facts of this case.

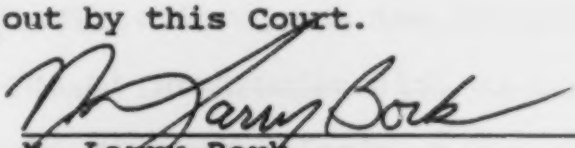
Petitioners attempted to resurrect the issue in an adversary proceeding in the Roy Clemence bankruptcy. The bankruptcy court dismissed that adversary proceeding based on res judicata and collateral estoppel, and that ruling is the root of the petition for a writ of certiorari currently before this Court.

The district court undertook an extensive review of the record and the facts, and affirmed the bankruptcy court's dismissal. The Tenth Circuit did likewise. None of the considerations set out in Sup. Ct. R. 10 are applicable to this situation, in any way.

This is a simple case in which three courts have determined that Bonnie Clemence did not convey any interest to Karen and Lontie Clemence in the deed dated May 19, 1982, and three courts have held that they should not be able to resurrect the issue in an adversary proceeding in the bankruptcy of Roy Clemence. It is certainly not the type of case in which this Court should grant a petition for a writ of certiorari.

The second matter raised by petitioners relates to 10th Cir. R. 34.1.9. The issue was not raised before the Tenth Circuit and is not a matter in which this Court has original

jurisdiction pursuant to 28 U.S.C. 1251. Even if the Court addresses this issue, it is not the basis for granting the petition, since the Tenth Circuit rule fully complies with the rule set out by this Court.



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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 1991, three true and correct copies of the above and foregoing brief, with attached appendix, were deposited in the United States mail, postage prepaid, addressed to:

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N. Larry Bork

APPENDIX

Date	Case No.	Court	Pages
2/24/84	83-0232 & 83-0233 and 83-0291 & 83-0290	Bankruptcy Court (Karen and Lontie)	1- 40
6/19/84	82-D-63	District Court Dickinson Co. Kan. (Roy and Bonnie)	41- 74
7/16/84	84-4256	District Court (Karen and Lontie)	75- 80
1/24/86	85-0278	Bankruptcy Court (Roy)	81- 87
4/28/87	84-2079	10th Circuit (Karen and Lontie)	88- 90
1/12/90	86-4091	District Court (Roy)	91- 96
2/22/91	90-3049	10th Circuit (Roy)	97-104

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
KAREN KAY CLEMENCE	No. 83-40307
LONTIE JOE CLEMENCE	No. 83-40308
Debtors.	
CITIZENS BANK AND TRUST COMPANY OF ABILENE,	
Plaintiff,	
vs. Adversary Proceeding	
KAREN KAY CLEMENCE and	No. 83-0232
LONTIE JOE CLEMENCE,	No. 83-0233
Defendants.	
ROY ARTHUR CLEMENCE,	
Plaintiff,	
vs. Adversary Proceeding	
KAREN KAY CLEMENCE and	No. 83-0291
LONTIE JOE CLEMENCE,	No. 83-0292
Defendants.	

MEMORANDUM OF DECISION

In this chapter 11 proceeding, the Court must determine whether the debtors own some 5,000 acres of real estate purportedly acquired by gift from their mother and father, and now challenged by their father and creditors.

The debtors are represented by Randall W. Forbes of Crane, Martin, Claussen, Hamilton & Forbes, Topeka, Kansas, and Peter V. Smilde of Smilde & Elkins, Dallas, Texas.

The creditor Citizens Bank and Trust Co. of Abilene is represented by Dale L. Somers of Eidson, Lewis, Porter & Haynes, Topeka, Kansas. Roy Clemence, father of the debtors, is represented by Charles R. Hay of Goodell, Stratton, Edmonds, Palmer & Wright, Topeka, Kansas, and Max M. Hinkle of Lehman, Guilfoyle, & Hinkle, Abilene, Kansas. The creditor National Bank of America at Salina is represented

by James T. Graves of Clark, Mize & Linville, Salina, Kansas.

Bonnie Jean Clemence, the debtors' mother and alleged transferor/donor, was not a party to this action and though she appeared as a witness, she was not represented.

The Court must decide the following issue:

Was the transfer of May 19, 1982 from the Bonnie Clemence Trust to Lontie and Karen Clemence of virtually all the Clemence real estate a valid transfer.

Do the debtors, Lontie and Karen Clemence, own the real estate in question.

FINDINGS OF FACT

Tolstoi wrote: "Happy families are all alike; every unhappy family is unhappy in its own way." (Anna Karenina, Pt. 1, ch. 1). Multiple chapter 11

proceedings, criminal accusations, a divorce proceeding and a bitter struggle over substantial land holdings and prospective inheritance is the unhappy way of this unhappy family.

Throughout this opinion, the Court refers to the members of the Clemence family by their first names. This is done neither out of disrespect nor familiarity. The members of the family were addressed and referred to by their first names at trial, and for purposes of continuity and clarity, the practice is continued in this opinion.

Roy C. Clemence is 76 years old. He has an eighth grade education. He first married when he was 28 years old to Zella Smith and 2 sons were born to the marriage: Roy Douglas Clemence (Doug) and Charles Roy Clemence (Chuck).

In 1953, Zella died. Roy had been acquainted with the Wilson family for several years. In 1954, Roy, at the age of 47, married one of the Wilson children, Bonnie Jean, who was then 26. When Roy married Bonnie, he owned one section of grassland in Dickinson County, Kansas, 5 pieces of river bottom ground and an interest in 880 acres in Geary County. The Wilson family apparently owned significant amounts of property. Though Bonnie did not immediately bring much of this property to the marriage, sometime later she received through inheritance her proportionate share of the family property.

Roy and Bonnie were married in May, 1954, and they entered into a written agreement in September, 1954 (defendant's exh. C). In the agreement, it is recited that Bonnie consented to Roy's will in

which she would receive less than one-half of his property. Roy agreed to waive his interest in any inheritance to be received by Bonnie and in certain property owned by Bonnie at the time. Roy and Bonnie had two children: Karen Kay Clemence and Lontie Joe Clemence. After their births, the substance of the 1954 agreement was repeated in subsequent wills. In 1968, both Roy and Bonnie executed wills and consented to each other's will. Bonnie's will (defendant's exh. F) provided that her property would pass to Roy for his life, with the remainder to Lontie and Karen. Roy's provided for a bequest of $40,000 to Doug, subject to an advancement and ademption made in 1965, and subject to payment of obligations guaranteed by Roy. Roy's will also provided for a bequest of land to Chuck, subject to similar

limitations. The remainder of Roy's property was to go to Bonnie and Karen and Lontie.

In 1978, trust agreements and new wills were executed by Bonnie and Roy (defendant's exhs, K, L, M and N. These agreements also provided for relatively small transfers to Doug and Chuck, and the bulk of the estate passing to Lontie and Karen.

There were allegations at the trial that Bonnie had defrauded Roy since 1954. There were allegations at the trial that since 1954 Roy never intended to essentially cut Doug and Chuck out of any property acquired by Bonnie. The documents, however, indicate quite plainly that Roy and his children would have no claim to Bonnie's estate existing in 1954, and any inheritance from the Wilson family. The documents also

indicate that both Roy and Bonnie intended the bulk of their estate to pass to only Lontie and Karen and not Doug and Chuck. Perhaps (in 1954) prior to the substantial growth in the couple's assets this seemed fair to Roy. Certainly by 1982 Roy did not believe it was fair for Karen and Lontie to receive the bulk of the Clemence farm. By 1982, Roy desired that one-half of all the land holdings go to Lontie and Karen, and one-half to Chuck and Doug. Bonnie rejected this proposal, desiring all the land to go to Lontie and Karen and, according to Roy, said "Wilson all the way."

After 1954, Bonnie and Roy operated their farm and in addition to giving birth to Lontie and Karen, they managed to dramatically increase their assets until, by 1982, the farm they operated was approximately 5,000 acres in size

located in 4 counties in Kansas. This land, however, was not land that would pass to Chuck and Doug, but rather, according to the wills and trusts, was destined to eventually pass to Karen and Lontie.

A number of events occurred in 1982 that brought to a head the family conflicts.

In May, 1982 and after contacting Bonnie and Roy a number of times concerning collection of or obtaining security for a debt, the Citizens Bank & Trust Co. of Abilene (Citizens) filed suit against Bonnie and Roy to collect the obligation owed to Citizens. There was quite a bit of testimony concerning the history of the Clemence line of credit with Citizens, use of the funds by either Roy, Bonnie, Roy and Bonnie, or Chuck and Lontie in the course of a

partnership called Clemence Brothers established to run the farm. In 1982 Citizens was interested in securing a mortgage on the 5,000 acre farm to secure the debt. Bonnie felt the Citizens obligation was Roy's and that her property destined to pass to Lontie and Karen should not be used to pay Roy's or the debts of the children of Roy's first marriage. The Court does not view it essential to attempt to resolve the many conflicting facts surrounding the Citizens loan. Suffice it to say the debt was due, Citizens could not obtain satisfaction, payment or security from any of the Clemence family, and it determined it necessary to take legal action.

In May, 1982 Citizens contacted Max Hinkle, an attorney in Abilene, to file suit against Bonnie and Roy. Before May,

1982 Mr. Hinkle had represented Roy and Bonnie. His work for them included preparation of real estate sale contracts and consent forms in conjunction with water rights applications. Other interested parties in this proceeding represented from time to time by Mr. Hinkle in matters directly relating to the Clemences included the Federal Land Bank for whom he did a title search in connection with the Clemence's attempt to secure a loan from the Land Bank. Mr. Hinkle also filed a criminal complaint as special prosecutor in Dickinson County at the behest of Chuck Clemence against Bonnie and Karen. (See, e.g., defendant's exh. GGG)

On May 18, 1982 Mr. Hinkle filed an action against Roy and Bonnie on behalf of Citizens. In the first count, Citizens sought judgement against only

Roy in the amount of approximately $149,000. In the second count, Citizens sought judgement against both Roy and Bonnie based on insufficient funds checks. Roy was served personally on May 27, 1982 and Bonnie was served on the same day. Sometime between May 27, 1982 and June 10, 1982 Roy approached Mr. Hinkle to represent him. Mr. Hinkle made a full disclosure to and obtained the consent of Citizens (although the Court cannot fathom why Citizens would object). Mr. Hinkle made a full disclosure to and obtained the consent of Roy. Thus, in count 1 of the complaint against Roy, Mr.. Hinkle represented both the plaintiff and the defendant. Apparently, even though one of Mr. Hinkle's allegations in the instant bankruptcy court action on behalf of Roy Clemence (Mr. Hinkle represented Roy Clemence in

this action) is that Roy had "diminished capacity" or at least was extremely maleable in the hands of people he trusted in May-June, 1982 due to his age, and Parkinson's disease, apparently Mr. Hinkle had no problem believing that Roy, although diminished in capacity, nonetheless maintained sufficient capacity to understand and competently determine that he wanted to be represented by the same attorney representing Citizens. The Court must candidly admit it has never understood Mr. Hinkle's theory of sliding-scale capacity and undue influence by persons in whom Roy placed trust. In any event, on June 10, 1982 Mr. Hinkle filed an answer for Roy in which Roy consented to judgement in favor of Citizens in the amount of $149,974.31, plus interest and costs. A journal entry was filed that

same day reflecting the consent judgement. Also on June 10, a cross petition was filed by Mr. Hinkle for Roy against Bonnie alleging she was liable for 1/2 of all judgements awarded to Citizens.

Several events occurred in May just prior to the commencement of Citizens' May 18, action.

On May 10, 1982 a warranty deed was executed transferring the land eventually destined to be Chuck's (see defendant's exhs. G, L) from the Roy Clemence Trust to the Bonnie Clemence Trust. The document was executed by Roy and Bonnie as trustee's of the Roy Clemence Trust, and notarized by Loren Harris of the National Bank of America (NBA) in Salina, Kansas (defendant's exh. O). This transfer (plaintiff's exh. 1) was apparently made to comply with a May,

1982 request of the Federal Land Bank (defendant's exh. FF). The basis of the request was a requirement made after a title search by Mr. Hinkle for the FLB in relation to a pending loan application by Roy and Bonnie Clemence.

On May 19, 1982 an undivided 1/2 interest in certain Ottawa County property held in the Roy Clemence Trust was transferred to the Bonnie Clemence Trust. Again, the deed was executed by Roy and Bonnie in their trustee capacity (defendant's exh. R). On May 19, 1982 virtually all the Clemence real estate, now being held in the Bonnie Clemence Trust, was deeded in a General Warranty Deed to Lontie and Karen Clemence (defendant's exh. S). The descriptions of the land transfer are attached to exhibit S and are over 5 legal pages in length. This transfer was also executed

by Bonnie and Roy in their capacity as trustees.

The sum and substance of these transfers were that in a matter of 9 days, virtually all of the Clemence property, 5,000 acres in four counties, held in either Roy's or Bonnie's trust was transferred, at least on paper, to Karen and Lontie Clemence for consideration of $1.00.

To further summarize, throughout April and May Citizens had been attempting to obtain security for their debt, preferably a mortgage on the Clemence land. Roy favored it. Bonnie opposed it. Citizens filed an action to collect the debt on May 18. Bonnie knew of the action on May 19 if Mr. Hinkle's testimony is believed. (In addition to the many parties represented by Mr. Hinkle, he was also called as a witness

by Karen and Lontie and provided what the Court views as key evidence. It is also interesting to note that in Bonnie's prior chapter 11 proceeding in this Court, Mr. Hinkle took the stand, as called by Dale Somers, an attorney for Citizens, to provide the only testimony offered in Citizens' motion to dismiss Bonnie's chapter 11.) Bonnie did not know of the action on May 19 if her testimony is believed, and the land was transferred to Karen and Lontie on May 19 for the consideration of $1.00.

The Court finds that on May 19 Bonnie either knew the suit was about to be filed due to Citizens' activities in April and May, or actually knew the suit had been filed, before service was obtained.

There was considerable evidence presented concerning the validity and

propriety of the transfers between the Roy Clemence Trust and the Bonnie Clemence Trust. Roy denied understanding the trust of 1978, the advances and ademptions with Chuck and Doug, the wills of the 1960's and even the agreement of 1954. Roy presented testimony to show that he executed the May, 1982 documents as a result of diminished capacity and undue influence, as part of a fraudulent scheme by Bonnie, Karen and Lontie to remove him from the farm operation, and to see to it that Karen and Lontie, and not Chuck and Doug, received the land. Needless to say there is conflicting evidence on these points.

On June 10, 1982 (the same day Roy consented to judgement in favor of Citizens and cross petitioned against his wife for 1/2 of the amount of the judgement), Max Hinkle filed a separate

maintenance action for Roy Clemence against Bonnie Clemence. This action was later amended to seek a divorce from Bonnie. Also on June 10, 1982 a restraining order was entered prohibiting Bonnie and Roy from transferring any property.

On July 29, 1982 Bonnie Clemence filed a chapter 11 petition in bankruptcy in this court. In her petition schedules, Bonnie listed the real estate located in Lincoln and Saline Counties as property owned by her. She listed the Dickinson and Ottawa Counties property as "Bonnie Clemence, Farm Land, Improvements . . . ." (see plaintiff's (Roy) exhs. 33, 43). She claimed 160 acres as exempt. In her schedules she stated that the only property she held for another person (question 8 in statement of financial affairs) was "Contingent. Bonnie Wilson

Clemence Trust, October 20, 1978 as amended 5/19/82." The amendment to which she referred is reflected in plaintiff's (Roy) exhibit 6 and constituted the creation of what is known as a QTIP trust. The QTIP trust did not purport to affect a transfer of ownership of the real estate in question to Karen and Lontie on May 19, 1982 and the attorney who drafted the QTIP trust (Lynn C. Hoover) testified he was unaware of the May 19 land transfer to Karen and Lontie. Although not outside the total family estate plan as he understood it, Mr. Hoover stated the transfer was not made on his advice. In answer to question 14 of the statement of financial affairs, Bonnie stated she had not made any gifts to family members in the year preceding her bankruptcy petition, nor had she made

any transfers other than granting a mortgage to the National Bank of America.

In the course of their parents' domestic relations action, Karen and Lontie were represented by Martin W. Bauer, an attorney from Wichita. In the instant action, the parties stipulated Mr. Bauer would testify he had no knowledge of the May 19 deed until after December 14, 1982 (plaintiff Roy's exh. 65).

On May 26, 1982 Bonnie granted Lontie the power of attorney to execute all Agricultural Stabilization County Supervisor (ASCS) forms (Roy's exh. 23). Roy's exhibit 27 indicates that in February, 1983 Bonnie contracted with Marvin and Marcia Freeman to sell them land on the authority of this Court in Bonnie's chapter 11 proceeding. Roy's exhibit 28 indicates a similar sale by

Bonnie to Stewart International, Inc. in February, 1983. See also Roy's exhibit 53. Both tracts of real estate to be sold by Bonnie in 1983 were part of the May 19 deed purportedly transferring the land to Karen and Lontie (compare Roy's exh. 4). Exhibits 27 and 28 do not mention Karen, Lontie or their claimed interest in the land.

In the domestic relations case Roy propounded interrogatories to Bonnie which she answered in October, 1982. (Roy's exh. 39) Interrogatory 10 asked if Bonnie "sold or disposed" of real property within the last 12 months. She answered "Apart from some estate planning transfers," there were none. The interrogatory #10 also requested Bonnie to "specify in detail any item of property sold or disposed of by gift, sale or otherwise, [and] the person to

whom said property was transferred . . . ." Bonnie's answer did not respond.

On Bonnie's monthly financial reports in her chapter 11 proceeding, she claimed the value of the real estate, almost $2.5 million, as her asset. (See, e.g., Roy's exhs. 47, 48, 49, 51, 52).

Not a single witness was produced at the instant trial who could testify that they knew or were informed of the May 19 deed until sometime in December, 1982. Neither John Koepke nor Donald Louden, Bonnie's bankruptcy attorneys, knew of the deed. Both testified they first heard of the deed in December, 1982. This testimony directly conflicts with the testimony of Bonnie and Karen who stated both attorneys were aware of the deed and were informed of the deed in June or July, 1982. Lynn C. Hoover, Bonnie's estate planning attorney, had no

knowledge of the deed. Representatives of the creditors involved in this case testified they did not know of the deed, although Loren Harris of NBA notarized the deed but asserted he did not read the document nor did he question what was being transferred. Federal Land Bank was unaware of the deed. Martin Bauer, Karen and Lontie's attorney in their parents' domestic relations action, had no knowledge of the deed prior to December of 1982.

Bonnie testified that Frank Norton, a Salina attorney who prepared a number of deeds for the Clemences, prepared the May 19 deed, but Mr. Norton testified neither he nor his office prepared the May 19 deed.

The deed was not filed of record by Karen and Lontie until April 25, 1983. This is curious because the May 10 deeds

transferring realty from Roy's trust to Bonnie's trust were filed of record on May 19, 1982. The May 14, 1982 deed was also filed of record on May 19. Thus, the only May, 1982 deed that was not filed immediately was the May 19 deed. It is clear to the Court that the May 19 deed was not recorded because Bonnie, Karen and Lontie believed the transfer was not effective until the deed was recorded. No gift tax return was filed dealing with the May 19 5,000 acre gift to Karen and Lontie.

Upon questioning by the Court, Karen indicated the following people were told of the deed:

> Orvil Teaman of Farmer's Home Administration, Dave Smith of Salina Credit Association, John Koepke, Bonnie's bankruptcy attorney Don Louden, Bonnie's Bankruptcy attorney.

Upon questioning by the Court, Karen indicated the following people knew of the deed:

Loren Harris of NBA
Martin Bauer, her attorney in the domestic relations action,
Bob Jones, an attorney practicing with Frank Norton

Yet, when called upon, no one testified they knew of, were told of, or even suspected the existence of the deed of May 19, until December, 1982. In December, 1982 the existence of the deed was discovered, and this Court ordered the dismissal of Bonnie's chapter 11 case on March 28, 1983.

On April 18, 1983 Karen and Lontie filed separate pro se chapter 11 petitions, claiming ownership of the land in question. They later employed counsel.

In addition to these facts the Court specifically finds as follows:

1. Before December, 1982, Karen, Lontie and Bonnie Clemence never

communicated to anyone other than Roy Clemence that virtually all 5,000 acres of real estate had been transferred to Karen and Lontie. The Court does not address the issues surrounding Roy's knowledge, participation or mistake in the transfer nor the issue of undue influence by Bonnie over Roy. The Court simply finds, contrary to the assertions of Karen, Lontie and Bonnie, that the transfer was never communicated to the many people they assert were told.

2. Karen, Lontie and Bonnie did not believe the transfer was effective until such time as the deed was filed of record.

3. The transfer was intended by Bonnie to be completed sometime in the future for the primary purpose of insuring that descent of the realty to Karen and Lontie as outlined in the many

agreements, wills and trusts executed by Roy and Bonnie since 1954 was carried out, and for the secondary reason of protecting the property from satisfaction of debts she considered solely Roy's, e.g., Citizens.

4. The actual ownership of the land as between Roy and Bonnie is irrelevant to this Court's determination because of the pending domestic relations action and because Bonnie Clemence is not a party to this proceeding.

5. Without deciding, but assuming arguendo that Roy willingly, competently, with full knowledge, and without influence executed the deeds of May 10, 14 and 19, 1982, nevertheless, he, like Bonnie, did not intend the deed to Karen and Lontie to be effective until some time in the future.

6. As of June 10, 1982, neither Bonnie, Roy, Karen or Lontie intended that Karen and Lontie own the land on that date.

7. As of February, 1983 neither Bonnie, Roy, Karen or Lontie intended that Karen and Lontie own the land on that date.

8. The Court makes no findings with respect to undue influence exercised by Bonnie over Roy, fraud perpetrated by Bonnie on Roy during May, 1982, 1978, 1976, 1968 or since 1954. The Court makes no findings with respect to any participation of Karen and Lontie in any fraud or undue influence.

9. Throughout Bonnie's chapter 11 proceeding, Karen and Lontie attended hearings, were approved as employee's of Bonnie's farming operation, and never uttered a word concerning their purported

ownership of the farm until December, 1982.

CONCLUSIONS OF LAW

When a transfer is made without consideration, such as the recited consideration of $1 in a real estate deed, there is an inference that a gift was intended. Hansen v. Walker, 175 Kan. 121, 123, 259 P. 2d 242 (1953). The elements of a valid gift are:

1. Intent by donor to make a voluntary, gratuitous, absolute transfer of property from the donor to the donee, effective immediately upon transfer and in which there is complete immediate surrender of control by the donor;

2. Delivery by the donor, and

3. Acceptance by the donee.

See, e.g., Truax v. Southwestern College, Oklahoma, 214 Kan. 873, 522 P.2d 412 (1974); In Re Brown's Estate, 159 Kan. 408, 155 P.2d 445 (1945); Lanphear v. McLean, 135 Kan. 266, 10 P.2d 889 (1932);

Hall v. Hall, 76 Kan. 806, 93 P. 177 (1903); Bruce v. Squires, 68 Kan. 199, 74 P. 1102 (1904); Gallagher V. Doraky, 65 Kan. 341, 69 P 330 (1902). The party asserting a valid gift has the burden of proving the existence of all the elements of a gift. Traux v. Southwestern College, Oklahoma, 214 Kan., supra 878.

The donor's intent is determined by the acts, words and circumstances surrounding the transfer. Stevenson v. Hunter, 131 Kan. supra at 754. The Court holds there was no intent by Bonnie or Roy to make an absolute transfer of the real estate to Lontie and Karen, nor to effect a complete and immediate surrender of control of the property. Certainly from Roy's standpoint, there are questions concerning fraud and undue influence which, if proved, would vitiate any intent he may have had to make an

absolute transfer. See, e.g., Frame v. Bauman, 202 Kan. 461, 449 P.2d 525 (1969); Seward v. Seward, 59 Kan. 387, 53 P. 63 (1898). More importantly for this Court's decision, however is an examination of Bonnie's intent.

Based on Bonnie's belief that the deed was not effective until recorded; her treatment of the land as hers and only hers from and after May 19, 1982; the secretive nature of the transfer in which one was told of the transfer for 7 months; her statements in writing, in her bankruptcy proceeding and the domestic relations action, may under oath, that she alone owned the real estate, it's clear to the Court that Bonnie did not intend the transfer to be effective on May 19, 1982.

In addition, she never surrendered control. See, Lamphear v. McLean, 135 Kan. 266, 10 P.3d 889 (1932); Bruce v. Squires, 68 Kan. 199, 74P. 1102 (1904); 38 CJS Gifts Section 20 at 799 (1943). The transfer must be so complete:

> that if the donor again resumes control over the property, without the consent of the donee, [s]he will become liable as a trespasser.

38 Am. Jur.2d Gifts Section 18 (1968). At all times, up to 1983, Bonnie controlled the land, claimed to own the land, attempted to sell the land without the donees' written consent in the sale contract, and in fact intended to use the land to generate money to fund her chapter 11 plan. Furthermore, a delivery for safekeeping or for a purpose, express or implied, other than a specific intent to part with all right, title and interest in and all dominion over the property does not constitute a gift.

Boling v. Gibson, 226 Ark. 310, 584 SW2d 14, 17 (1979), affirmed after remand, 622 SW2d 180. This "delivery" to Karen and Lontie was made without the specific intent to part with all right, title and interest in, and dominion over the real estate. This transfer was made to put the property beyond the reach of Citizens because of the belief that the Citizens debt was a debt of Roy, Chuck and Doug, and should not be satisfied out of real estate destined to pass to Lontie and Karen only and to ensure that 28 years of intent as expressed by various wills and trusts be carried out.

Either Karen or Lontie or both appeared with their mother at hearings during her chapter 11 proceeding. Lontie and Karen were paid and listed as employees in their mother's chapter 11 proceeding (exh. 42, 5). From July 23,

1982, the date of filing of Bonnie's chapter 11, to at least mid-December of 1982 neither Karen nor Lontie disclosed their purported ownership of the 5,000 acres of land listed as an asset in their mother's chapter 11 proceeding. Additionally, they did not object to her offering for sale during that chapter 11 proceeding various tracts of that 5,000 acres nor did they voice an objection to proposed sales which, though not consummated, had times set for objection and called for hearing.

> No gift can be complete without the acceptance thereof by the donee . . . . The law presumes such acceptance in the absence of evidence to the contrary.

Mahoney v. Martin, 72 Kan. 406, 410, 83 P. 982 (1905) (emphasis added). In the instant case, Karen and Lontie's silence, their acquiescence in Bonnie's claim of ownership in the land, their employment

by Bonnie (certainly this is a fact inconsistent with ownership - if Karen and Lontie owned the land, they should have employed Bonnie) and allowing Bonnie to sell the land all indicate that there was not an acceptance of the gift until at least February, 1983.

Therefore, the Court holds the transfer of the real estate to Karen and Lontie on May 19, 1982 was not an effective gift, because it lacked, and Karen and Lontie failed to prove, the requisite elements of a gift. Even if the burden of proof in this case was on Roy and the creditors, as Karen and Lontie argue, the Court would hold that Roy and the creditors have proved that a valid gift was not made. The Court holds there was no intent to make a transfer, nor was there an effective transfer before June 10, 1982. At that point,

Bonnie as enjoined from transferring the property in any manner by the restraining order issued by the state court judge in the domestic relations actions. Accordingly, the Court holds that the owner of the real estate is the Bonnie Clemence Trust and not the debtors in this chapter 11 proceeding, Karen and Lontie Clemence. The Court makes no determination of the allegations of diminished capacity of Roy, fraud perpetrated on Roy, nor undue influence exercised to Roy's detriment. By this Court's holding today, the property is returned to the jurisdiction of the state court to be divided in the divorce proceeding pursuant to the state court's authority, in light of the agreements, wills and trusts since 1954, the statutory and case law factors, and in light of the allegations made by Roy.

The foregoing constitutes Findings of Fact and Conclusions of Law under Bankruptcy Rule 7052 and Rule 52(a) of the Federal Rules of Civil Procedure.

Dated at Topeka, Kansas this 24 day of February, 1984.

S/James A. Pusateri

CERTIFICATE OF MAILING

The undersigned certifies that a copy of the foregoing Memorandum of Decision was placed in the United States mail on the 24th day of February, 1984 addressed to:

Randall J. Forbes
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S/Sherryne M. Evans,
Secretary to:
JAMES A. PUSATERI
Bankruptcy Judge

IN THE DISTRICT COURT OF DICKINSON COUNTY, KANSAS

(FILED 6-20-84, 2:10 PM)

ROY ARTHUR CLEMENCE,)
)
Plaintiff,)
)
vs.)
)
)
BONNIE J. CLEMENCE,)
)
Defendant.)

Case No. 82 D 63

DECREE OF DIVORCE

Now, on this 19th day of June, 1984, the above-styled-cause come regularly on for trial of the issues in controversy between the Plaintiff, Roy Arthur Clemence, and the Defendant, Bonnie J. Clemence, said Plaintiff and Defendant being hereinafter referred to collectively as the "parties" and individually as the "Plaintiff" and the "Defendant". The Plaintiff appears

personally and by his attorney, Max M. Hinkle of Lehman, Guilfoyle & Hinkle of Abilene, Kansas, but the Defendant appears not, neither in person nor by an attorney.

WHEREUPON, Plaintiff announces that he is ready to proceed to trial, and the Court, finding that this matter was set for trial on this date ninety (90) days ago and at a time when the Defendant was represented by legal counsel and that this setting was agreed to by Defendant's counsel prior to his withdrawing from the case, and that the Defendant has made no request for a postponement of the same, further finds that the trial should proceed as ordered in the absence of the Defendant.

WHEREUPON, Plaintiff presents his evidence and rests, and no evidence is presented on behalf of the Defendant; and

the Court, having heard the evidence and being advised in the premises, finds as follows:

I. That the Court has jurisdiction in personam over both the Plaintiff and the Defendant and has jurisdiction of the subject matter hereof and that proper venue lies with this Court.

II. That the Plaintiff was a bona fide resident of the state of Kansas for more than the sixty (60) days next preceding the filing of his petition for divorce herein; that the parties were united in marriage on the 21st day of May, 1954, at Abilene in Dickinson County, Kansas and have been at all times since that time and now are husband and wife.

III. That there are no minor children of this marriage.

IV. That differences have arisen between the parties of such a nature and to such an extent that it is impossible for them to live together harmoniously as husband and wife, and that a decree of divorce on the grounds of incompatibility should be granted to the Plaintiff from the Defendant.

V. That neither party should have judgment against the other for alimony.

VI. That the property of the parties should be divided between them in the manner as follows:

A. The Plaintiff should have as his sole and separate property, free and clear of all claims of the Defendant, the following:

1. All that real estate listed and enumerated on Exhibit A annexed hereto, subject, however, to the final determination yet to be made by the

United States Bankruptcy Court for the District of Kansas concerning the validity of a certain deed executed on the 19th day of May, 1982, by the parties as Trustees of the Bonnie J. Clemence Trust purporting to convey to Karen K. Clemence and Lontie J. Clemence certain tracts of land situated in Dickinson County and Ottawa County, Kansas, which are listed among those shown on the aforesaid Exhibit A. Should the aforesaid deed be finally determined to be invalid it is the finding of this Court that the ownership of all lands described therein as well as the other lands described in the aforesaid Exhibit A should be set over to the Plaintiff as his sole and separate property, free and clear of all claims of the Defendant. Should said deed be finally determined to

be valid then this finding shall have no bearing on the lands described therein.

2. All interest of the parties in and to a certain contract for the sale of real estate entered into by and between Plaintiff and Defendant as Sellers and Samuel W. Kincaid and Georgia L. Kincaid as Buyers, said contract being dated the 4th day of April, 1979, and escrowed at the Assaria State Bank, Assaria, Kansas.

3. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Robert F. Patton and Ida Mae Patton as Sellers, said contract being dated the 4th day of February, 1976, and escrowed at the Solomon State Bank, Solomon, Kansas.

4. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Otis Rollins Clemence and Beulah Clemence as Sellers, said contract being dated the 11th day of January, 1974, and escrowed at the Citizens Bank and Trust Co., Bailene, Kansas.

5. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

6. All interest of the parties in and to a certain contract for

the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and the Addendum to said Contract being dated the 20th day of July, 1978, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

7. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

8. All farm and livestock tools, equipment and supplies heretofore

belonging to either or both of the parties.

9. All farm machinery belonging to either or both of the parties, including but not limited to the following:

a) One (1) Waldon dual drill hitch;

b) One (1) Farmhand tub grinder;

c) One (1) 8' Speed mover;

d) One (1) John Deere 158 loader;

e) Two (2) pickup beds;

f) Two (2) truck feed boxes.

10. All motor vehicles belonging to either or both of the parties, except two (2) Cadillac sedans, including but not limited to the

following:

a) One (1) 1980 Chevrolet 1/2 Ton Four Wheel drive pickup;

b) One (1) 1975 GMC 1/2 Ton pickup truck;

c) One (1) 1969 Chevrolet two ton truck (wrecked)

d) One (1) 1966 Chevrolet two ton truck (motor out);

e) One (1) 1965 Ford two ton truck;

f) One (1) 1957 Chevrolet two ton truck (registered);

g) One (1) 1957 Chevrolet two ton truck (unregistered);

h) One (1) 1974 Chevrolet half ton four-wheel drive;

i) One (1) 1973 Chevrolet 3/4 ton truck (shop

truck);

j) One (1) 1974 Chevrolet 1/2 ton pickup truck (inoperable)

k) One (1) 1965 Chevrolet truck (tractor truck);

l) One (1) 1965 El Camino;

m) One (1) 1965 El Camino;

n) One (1) 1950 Chevrolet one ton truck.

11. Life insurance policies issued on the life of the Plaintiff, as follows:

a) Victory Life Insurance policy no. 586603;

b) Manhattan Life Insurance policy no. 756034;

c) New York Life Insurance policy no. 36,001,732;

d) New York Life Insurance policy no. 27,043,163;

e) New York Life Insurance policy

no. 27,018,894;

f) New York Life Insurance policy no. 27,018,895.

12. All grain, hay and silage now in storage belonging to either or both of the parties, including but not limited to the following:

a) 799.92 bushels of 1977 wheat in the Abilene Coop. Assoc., Abilene, Kansas;

b) 679.00 bushels of 1979 wheat in the Abilene Coop. Assoc., Abilene, Kansas;

c) 156 bushels of wheat in the Lincoln Coop, Lincoln, Kansas.

13. All shares of stock now owned by the parties or either of them in the following farm cooperatives:

a) The Farmers Coop. Assoc., Talmage, Kansas;

b) The Solomon Coop. Assoc., Solomon,

Kansas;

c) The Abilene Coop. Assoc., Abilene, Kansas.

14. All reserved patronage dividends now held for the account of the parties or either of them by the following farm cooperatives:

a) The Farmers Coop. Assoc., Talmage, Kansas;

b) The Solomon Coop. Assoc., Solomon, Kansas;

c) The Abilene Coop. Assoc., Abilene, Kansas.

15. All shares of stock now issued by the Federal Land Bank of Wichita, Kansas, to the parties or either of them.

16. Two (2) quarter horses.

17. All those proceeds now held by the Clerk of this Court deriving from the sale or sales of cattle

pursuant to previous orders made herein, said proceeds together with interest accruing thereon to be paid to the Plaintiff forthwith.

18. That certain promissory note in the principal sum of $28,000.00 issued by Lontie J. Clemence to the parties on or about the 16th day of October, 1979, and the first real estate mortgage securing the same, said mortgage being dated the 16th day of October, 1979, and recorded on December 28, 1979, in Mortgage Book 168, Page 517 in the office of the Dickinson County Register of Deeds.

19. All that ornamental iron presently stored at the main house at Sand Springs.

20. All interest of the parties or either of them in those proceeds from the 1983 wheat crop

impounded and now held by the Clerk of the United States Bankruptcy Court together with all interest accruing thereon.

21. All of the interest of the parties or either of them in government payments under 1983 farm programs including all grain entitlements under 1983 PIR contracts pertaining to any of the lands described above.

22. All of the interest of the parties or either of them in 1984 crops now growing or heretofore harvested from any of the lands described above.

23. All of the interest of the parties or either of them in pasture rentals accrued or accruing under 1983 and current leases of any of the real estate listed above.

24. All claims against Lontie J. Clemence and Karen K. Clemence

for reimbursement for crops harvested in 1983 and 1984 and government program payments made in connection therewith and for pasture rentals for 1983 and 1984, all with respect to any of the real estate described in Exhibit A annexed hereto.

25. All counterclaims and crossclaims filed by the parties or either of them in this Court in Case No. 80 C 205, Ralph M. Stoneberger and Debra Stoneberger vs. Roy A. Clemence and Bonnie J. Clemence, et al.

26. All capital credits held for the account of either or both of the parties by D.S. & O. Rural Electric, Solomon, Kansas.

27. Plaintiff's checking account in the Citizens Bank and Trust Co, Abilene, Kansas.

B. The Defendant should have as her sole and separate property, free and clear of all claims of the Plaintiff, the following:

1. All household goods and antiques belonging to the parties or either of them, but not including the ornamental iron above awarded to the Plaintiff.

2. All cash presently in her possession.

3. Cemetery lots in Salina, Kansas.

4. Two (2) Arabian horses.

5. The real estate situated in Saline County, Kansas, described as follows:

a) Lot Three (3), Elm Grove Addition, Salina, Kansas;

b) The South Six Feet (6') of Lot Five (5), Block Seventeen (17), South Park Addition, Salina, Kansas;

c) A triangular tract adjacent to and North of Lots three (3), Four (4) and Five (5), Block Eleven (11), Chicago Addition plus the adjacent vacated Grand Blvd., Salina, Kansas.

6. One (1) 1979 Cadillac.

7. One (1) 1976 Cadillac.

VII. Each party should assume and pay all indebtedness contracted or incurred by him on or after June 10, 1982, and neither party should have judgment against the other with respect to any such indebtedness.

VIII. The costs hereof should be assessed to the Plaintiff.

IT IS THEREFORE, BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED as follows:

IX. That the Plaintiff, Roy Arthur Clemence, be and he is hereby granted a Decree of Divorce from the Defendant, Bonnie J. Clemence, on the grounds of incompatibility and the marital bonds heretofore established between the Plaintiff and the Defendant are hereby permanently and absolutely dissolved.

X. That the property of the parties is hereby divided between them in the manner following:

A. The Plaintiff shall have as his sole and separate property, free and clear of all claims of the Defendant, the following:

1. All that real estate listed and enumerated on Exhibit A annexed hereto, subject, however, to the

final determination yet to be made by the United States Bankruptcy Court for the District of Kansas concerning the validity of a certain deed executed on the 19th day of May, 1982, by the parties as Trustees of the Bonnie J. Clemence Trust purporting to convey to Karen K. Clemence and Lontie J. Clemence certain tracts of land situated in Dickinson County and Ottawa County, Kansas, which are listed among those shown on the aforesaid Exhibit A. Should the aforesaid deed be finally determined to be invalid it is the finding of this Court that the ownership of all lands described therein as well as the other lands described in the aforesaid Exhibit A should be set over to the Plaintiff as his sole and separate property, free and clear of all claims of the Defendant. Should said deed be finally determined to

be valid then this finding shall have no bearing on the lands described therein.

2. All interest of the parties in and to a certain contract for the sale of real estate entered into by and between Plaintiff and Defendant as Sellers and Samuel W. Kincaid and Georgia L. Kincaid as Buyers, said contract being dated the 4th day of April, 1979, and escrowed at the Assaria State Bank, Assaria, Kansas.

3. All interest of the parties in and to a certain contract for the purchase of real estate entered into by an between the Plaintiff and Defendant as Buyers and Robert F. Patton and Ida Mae Patton as Sellers, said contract being dated the 4th day of February, 1976, and escrowed at the Solomon State Bank, Solomon, Kansas.

4. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Otis Rollins Clemence and Beulah Clemence as Sellers, said contract being dated the 11th day of January, 1974, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

5. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

6. All interest of the parties in and to a certain contract for

the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and the Addendum to said contract being dated the 20th day of July, 1978, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

7. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

8. All farm and livestock tools, equipment and supplies heretofore

belonging to either or both of the parties.

9. All farm machinery belonging to either or both of the parties, including but not limited to the following;

a) One (1) Waldon dual drill hitch;

b) One (1) Farmhand tub grinder;

c) One (1) 8' Speed mover;

d) One (1) John Deere 158 loader;

e) Two (2) pickup beds;

f) Two (2) truck feed boxes.

10. All motor vehicles belonging to either or both of the parties, except two (2) Cadillac sedans, including but not limited to the following:

a) One (1) 1980 Chevrolet 1/2

Ton Four Wheel drive pickup;

b) One (1) 1975 GMC 1/2 ton pickup truck;

c) One (1) 1969 Chevrolet two ton truck (wrecked);

d) One (1) 1966 Chevrolet two ton truck (motor out);

e) One (1) 1965 Ford two ton truck;

f) One (1) 1957 Chevrolet two ton truck (registered);

g) One (1) 1957 Chevrolet two ton truck (unregistered);

h) One (1) 1974 Chevrolet half ton four-wheel drive;

i) One (1) 1973 Chevrolet 3/4 ton truck (shop truck);

j) One (1) 1974 Chevrolet 1/2 ton pickup truck (inoperable);

k) One (1) 1965 Chevrolet truck (tractor truck);

l) One (1) 1965 El Camino;

m) One (1) 1965 El Camino;

n) One (1) 1950 Chevrolet one ton truck.

11. Life insurance policies issued on the life of the Plaintiff, as follows:

a) Victory Life Insurance policy no. 586603;

b) Manhattan Life Insurance policy no. 756034;

c) New York Life Insurance policy no. 36,001,732;

d) New York Life Insurance policy no. 27,043,163;

e) New York Life Insurance policy no. 27,018,894;

f) New York Life

Insurance policy
no. 27,018,895.

12. All grain, hay and silage now in storage belonging to either or both of the parties, including but not limited to the following:

a) 799.92 bushels of 1977 wheat in the Abilene, Coop. Assoc., Abilene, Kansas;

b) 679.00 bushels of 1979 wheat in the Abilene Coop. Assoc., Abilene, Kansas;

c) 156 bushels of wheat in the Lincoln Coop, Lincoln, Kansas.

13. All shares of stock now owned by the parties or either of them in the following farm cooperatives:

a) The Farmers Coop. Assoc., Talmage, Kansas;

b) The Solomon Coop. Assoc., Solomon, Kansas;

c) The Abilene Coop. Assoc., Abilene, Kansas.

14. All reserved patronage dividends now held for the account of the parties or either of them by the following farm cooperatives:

a) The Farmers Coop. Assoc., Talmage, Kansas;

b) The Solomon Coop. Assoc., Solomon, Kansas;

c) The Abilene Coop. Assoc., Abilene, Kansas.

15. All shares of stock now issued by the Federal Land Bank of Wichita, Kansas, to the parties or either of them.

16. Two (2) quarter horses.

17. All those proceeds now held by the Clerk of this Court deriving from the sale or sales of cattle pursuant

to previous orders made herein, said proceeds together with interest accruing thereon to be paid to the Plaintiff forthwith.

18. That certain promissory note in the principal sum of $28,000.00 issued by Lontie J. Clemence to the parties on or about the 16th day of October, 1979, and the first real estate mortgage securing the same, said mortgage being dated the 16th day of October 1979, and recorded on December 28, 1979, in Mortgage Book 168, Page 517 in the office of the Dickinson County Register of Deeds.

19. All that ornamental iron presently stored at the main house at Sand Springs.

20. All interest of the parties or either of them in those proceeds from the 1983 wheat crop

impounded and now held by the Clerk of the United States Bankruptcy Court together with all interest accruing thereon.

21. All of the interest of the parties or either of them in government payments under the 1983 farm programs including all grain entitlements under 1983 PIK contracts pertaining to any of the lands described above.

22. All of the interest of the parties or either of them in 1984 crops now growing or heretofore harvested from any of the lands described above.

23. All of the interest of the parties or either of them in pasture rentals accrued or accruing under 1983 and current leases of any of the real estate listed above.

24. All claims against Lontie J. Clemence and Karen K. Clemence

for reimbursement for crops harvested in 1983 and 1984 and government program payments made in connection therewith and for pasture rentals for 1983 and 1984, all with respect to any of the real estate described in Exhibit A annexed hereto.

25. All counterclaims and crossclaims filed by the parties or either of them in this Court in Case No. 80 C 205, Ralph M. Stoneberger and Debra Stoneberger vs. Roy A. Clemence and Bonnie J. Clemence, et al.

26. All capital credits held for the account of either or both of the parties by D.S.&O. Rural Electric, Solomon, Kansas.

27. Plaintiff's checking account in the Citizens Bank and Trust Co, Abilene, Kansas.

B. The Defendant shall have as her sole and separate property, free and clear of all claims of the Plaintiff, the following:

1. All household goods and antiques belonging to the parties or either of them, but not including the ornamental iron above awarded to the Plaintiff.

2. All cash presently in her possession.

3. Cemetery lots in Salina, Kansas.

4. Two (2) Arabian horses.

5. The real estate situated in Saline County, Kansas, described as follows:

a) Lot Three (3), Elm Grove Addition, Salina, Kansas;

b) The South Six Feet (6') of Lot Five (5), Block Seventeen (17), South Park Addition, Salina, Kansas;

c) A triangular tract adjacent to and North of Lots Three (3), Four (4) and Five (5), Block Eleven (11), Chicago Addition plus the adjacent vacated Grand Blvd., Salina, Kansas.

6. One (1) 1979 Cadillac.

7. One (1) 1976 Cadillac.

XI. Each party shall assume and pay all indebtedness contracted or incurred by him or her on or after June 10, 1982, and neither party shall have judgment against the other with respect to any such indebtedness.

XII. The costs hereof are assessed to the Plaintiff.

XIII. That the parties shall execute, deliver and exchange wherever the same

may be necessary to effectuate the judgments issued herein deeds, receipts, bills of sale, and any and all other necessary and incidental documents. In the event of the failure or refusal of either of the parties to so execute and deliver such instruments as may be necessary to effectuate the judgements issued herein, then and in that event the judgments made herein shall stand in lieu of such instruments.

S/_____
District Judge, Div. I

SUBMITTED BY:

LEHMAN, GUILFOYLE & HINKLE

By S/Max M. Hinkle
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

In re:	)
	)
KAREN KAY CLEMENCE No. 83-40307	)
LONTIE JOE CLEMENCE No. 83-40308	)
	)
Debtors,	)
	)
CITIZENS BANK AND TRUST COMPANY OF ABILENE,	)
	)
Plaintiff,	)
vs. Adversary Proceeding	)
	)
KAREN KAY CLEMENCE and No.83-0232	)
LONTIE JOE CLEMENCE, No.83-0233	)
	)
Defendants.	)
	)
ROY ARTHUR CLEMENCE,	)
	)
Plaintiff,	)
	)
vs. Adversary Proceeding	)
	)
KAREN KAY CLEMENCE and No.83-0291	)
LONTIE JOE CLEMENCE, No.83-0292	)
	)
Defendants.	)

O R D E R

This case is before the court for a review of findings made by Bankruptcy

Judge Pusateri in a memorandum of decision lodged February 24, 1984 pursuant to Rule 42 of the Local Rules of Practice. This Rule provides:

> In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject or modify, in whole or in part, the order or judgement of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

This court has carefully reviewed the lengthy transcript of the hearing which was the basis of Judge Pusateri's decision. In addition, the court has reviewed memoranda submitted by the interested parties and "additional evidence" submitted by the debtors. On the basis of this study, the court makes the following findings:

1. This court has jurisdiction over this matter under 28 U.S.C. Section 1334 and 1471 (a) (b) & (e).

2. This matter was properly referred for decision by Bankruptcy Judge Pusateri under Local Rule 42.

3. Local Rule 42 is not unconstitutional and empowers this court to grant authority to Bankruptcy Judge Pusateri to hear this case. Oklahoma Health Services Federal Credit Union v. Webb, 726 F.2d 624 (10th Cir. 1984); White Motor Corp. v. Citibank, 704 F.2d 254 (6th Cir. 1983).

4. Roy Clemence is a proper party with an interest in the property claimed by the debtors by reason of his petition for separate maintenance. Cady v. Cady, 224 Kan. 339, 581 P.2d 358 (1978).

5. No error was committed by proceeding in the absence of Bonnie

Clemence as a party for the following reasons:

a) The findings of this court do not injure any interest asserted by Bonnie Clemence;

b) Bonnie Clemence had an opportunity to assert an interest as an intervening party but did not elect to do so;

c) Any interest of Bonnie Clemence in sustaining her conveyance to the debtors was fully represented by the debtors in this action;

d) The parties in this suit are not subject to double, multiple, or inconsistent obligations by reason of any interest claimed by Bonnie Clemence; and

e) There is no other reason in equity or good conscience for the joinder of Bonnie Clemence as a party.

6. Aside from the factual findings that Lynn Hoover did not know of the May 19, 1982 deed prior to December 1982, the court shall adopt the findings of fact and conclusions of law contained in the memorandum of decision lodged by Judge Pusateri. The court finds that Hoover knew of the deed prior to December 1982. This finding, however, does not alter the court's decision to accept the other findings and conclusions submitted by Judge Pusateri.

7. The court has considered the "new evidence" submitted on behalf of the debtors, most, if not all, of which could have been presented during the hearing before Judge Pusateri. This evidence has not persuaded the court to decline to accept the findings of Judge Pusateri, to hold further hearings on this matter, or to completely retry the issues involved.

8. Debtors have had sufficient time to present evidence and arguments in this matter. The court is convinced that an extension of time would serve no useful purpose. Consequently, debtors' motion for enlargement of time filed April 27, 1984 is denied.

In conclusion, the court has reviewed the memorandum of decision of Judge Pusateri lodged on February 24, 1984 in accordance with Local Rule 42(e)(2)(B) and approves and adopts the findings of fact and conclusions of law contained therein consistent with the previous statements in this order.

IT IS SO ORDERED.

Dated this 16th day of July, 1984, at Topeka, Kansas.

S/Richard D. Rogers
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:

ROY ARTHUR CLEMENCE,
CONSERVATEE/DEBTOR;
CHARLES R. CLEMENCE
AND ROY D. CLEMENCE,
CO-CONSERVATORS FOR
ROY A. CLEMENCE

CASE NO. 85-40164

IN RE:

LONTIE J. CLEMENCE AND
KAREN K. CLEMENCE,
INDIVIDUALLY AND IN THEIR
SEVERABLE CAPACITIES AS
STOCKHOLDERS OF AND TRUSTEES
FOR "THE BONNIE J. CLEMENCE
TRUST, UTA 7/25/84"; BONNIE
J. CLEMENCE, INDIVIDUALLY
AND IN HER CAPACITY AS STOCK-
HOLDER OF "THE BONNIE J.
CLEMENCE TRUST UTA 7/25/84"

Plaintiffs,

vs.

Adv. Proceeding
No. 85-0278

ROY ARTHUR CLEMENCE,
CONSERVATEE/DEBTOR; CHARLES
R. CLEMENCE AND R. DOUGLAS
CLEMENCE, CO-CONSERVATORS
FOR ROY A. CLEMENCE,

Defendants.

ORDER

Now on this 24th day of January, 1986,

defendants Roy Arthur Clemence, conservatee-

debtor and Charles R. Clemence and R. Douglas Clemence, co-conservators' Motion to Dismiss came on for hearing. The defendants appeared by counsel, Marta Fisher Linenberger of Goodell, Stratton, Edmonds and Palmer; plaintiffs appears by Karen K. Clemence and Bonnie J. Clemence.

Upon hearing statements of the parties and upon consideration of the evidence, the Court finds that defendants' Motion to Dismiss should be granted on the grounds that the claims and issues presented in plaintiff's Complaint have already been determined by this Court and therefore are barred by res judicata and collateral estoppel.

IT IS THEREFORE ORDERED that plaintiffs' complaint and amended complaints in this matter are dismissed with prejudice.

IT IS SO ORDERED.

/s/ James A. Pusateri
James A. Pusateri
United States Bankruptcy Judge

APPROVED BY:

/s/ Marta Fisher Linenberger
Marta Fisher Linenberger
GOODELL, STRATTON, EDMONDS & PALMER
215 E. Eighth Avenue
Topeka, KS 66603-3999
913/233-0593

1/30/86 File-stamped copy mailed by First Class Mail to:

Lontie J. Clemence, Route 4, Abilene, KS 67410
Karen Kay Clemence, Satilite Office, Suite 215, 7740 Metcalf, Overland Park, KS
Bonnie J. Clemence, 3012 W. 89th Terrace Leawood, KS 66206
Marta Fisher Linenberger, 215 E. 8th, Topeka, KS 66603-3999
Charles R. Hay, 215 E. 8th, Topeka, KS 66603-3999
Max M. Hinkle, 306 NW Second, Abilene, KS 67410
Office of Ass't U.S. Trustee, 401 N. Market, Room 501, Wichita, KS 67201
Roy Arthur Clemence, Route 4, Abilene, KS 67410

_____ Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
ROY ARTHUR CLEMENCE, Charles R. Clemence and R. Douglas Clemence, Conservators,	)	No. 85-40164
	)	
Debtor.	)	
	)	
LONTIE J. CLEMENCE and KAREN K. CLEMENCE, Individually and in their severable capacities as stock-holders of and trustees for "The Bonnie J. Clemence Trust, UTA 7/25-84,"	)	Adversary Proceeding
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	No. 85-0278
ROY ARTHUR CLEMENCE, Conservatee/debtor; Charles R. Clemence and R. Douglas Clemence, co-conservator for Roy A. Clemence,	)	
	)	
Defendant.	)	

ORDER NUNC PRO TUNC AND
ORDER DENYING MOTION FOR REHEARING

Now on this 6th day of March, 1986, the Court determines that its order dated January

24, 1986, to reflect the true facts in this case, should be amended to read as follows:

"Upon hearing statements of the parties and upon consideration of the evidence, the court finds that defendants' Motion to Dismiss should be granted on the grounds that the claims and issues presented in plaintiff's Complaint have already been determined by this Court and the United States District Court for the District of Kansas and therefore are barred by res judicata and collateral estoppel."

The Court further finds that the plaintiff's motion for rehearing should be denied.

IT IS SO ORDERED.

/s/ James A. Pusateri
JAMES A. PUSATERI
Bankruptcy Judge

CERTIFICATE OF MAILING

The undersigned certifies that a copy of the foregoing Order Nunc Pro Tunc and Order Denying Motion for Rehearing was placed in the United States mail on the 6th day of March, 1986 addressed to:

Karen Kay Clemence
Satilite Office, Suite 215
7740 Metcalf
Overland Park, Kansas 66204

Lontie J. Clemence
Route 4
Abilene, Kansas 67410

Charles R. Hay
GOODELL, STRATTON, EDMONDS & PALMER
215 East Eighth
Topeka, Kansas 66603

Max M. Hinkle
LEHMAN, GUILFOYLE & HINKLE
306 NW Second Street
Abilene, Kansas 67410

Bonnie J. Clemence
3012 West 89th Terr.
Leawood, Kansas 66206

David Seitter
Attorney at Law
4101 West 54th Terr.
Shawnee Mission, Kansas 66205

William M. Tarnow
Assistant Regional Counsel
The Prudential Life Insurance Co.
of America
1431 Opus Place, Suite 665
Downers Grove, Illinois 60615

Carol A. Park
Assistant U.S. Trustee
501 U.S. Courthouse
401 North Market Street
Wichita, Kansas 67202

/s/ Sherryne M. Evans
Sherryne M. Evans, Secretary to
JAMES A. PUSATERI
Bankruptcy Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

IN RE	)	
	)	
KAREN KAY CLEMENCE and LONTIE JOE CLEMENCE,	)	
	)	
Debtors,	)	
	)	
CITIZENS STATE BANK OF ABILENE; ROY DOUGLAS CLEMENCE and CHARLES ROY CLEMENCE,	)	
	)	
Plaintiffs-Appellees,	)	No. 84-2079
	)	(D.C. No. 84-4256)
v.	)	(D. Kan.)
	)	
KAREN KAY CLEMENCE and LONTIE JOE CLEMENCE,	)	
	)	
Defendants-Appellants.	)	

ORDER AND JUDGMENT

Before ANDERSON and BARRETT, Circuit Judges, and THOMPSON, District Judge.*

---

*The Honorable Ralph G. Thompson, Chief Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

After examining the briefs and the appellate record, this three-judge panel has

determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.8(c) and 27.1.2. The cause is therefore ordered submitted without oral argument.

Defendants-debtors appeal from a district court order adopting the bankruptcy judge's decision in favor of plaintiff-appellant in this adversary proceeding brought to determine debtors' rights in certain Kansas real estate.

We hold that the district court correctly exercised jurisdiction over the parties and subject matter and followed proper procedures in its review of the case. We also concur in the detailed findings and thorough analysis of the merits by the bankruptcy judge and district court.

The judgment of the United States District Court for the District of Kansas is AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
LONTIE J. CLEMENCE and KAREN K. CLEMENCE, Individually and in their severable capacities as stock-holders of and trustees for "THE BONNIE J. CLEMENCE TRUST, UTA 7/25/84"; BONNIE J. CLEMENCE, Individually and in her capacity as stockholder of "THE BONNIE J. CLEMENCE TRUST, UTA 7/25/84",	)	
	)	
Plaintiffs/appellants,	)	Case No. 86-4091 (85-40164)
vs.	)	Adv. Proceeding (85-0278)
ROY ARTHUR CLEMENCE, Conservatee/Debtor; CHARLES R. CLEMENCE and R. DOUGLAS CLEMENCE, Co-Conservators for Roy A. Clemence,	)	
	)	
Defendants. Appellees	)	

O R D E R

This is a long-pending bankruptcy appeal. Appellants Bonnie J. Clemence, Lontie Clemence and Karen Clemence filed an adversary proceeding asking for declaratory judgment. Appellants sought a declaration from the

Bankruptcy Court that certain lands described in a general warranty deed dated May 19, 1982 are not property of the estate of the debtor, Roy A. Clemence, until the deed is adjudicated invalid.

The bankruptcy court dismissed the adversary proceeding on the grounds that "the claims and issues presented in plaintiff's Complaint have already been determined by this Court and the United States District Court for the District of Kansas and therefore are barred by res judicata and collateral estoppel." The appellees have asked for summary affirmance on the same basis, noting, in addition, that the Tenth Circuit Court of Appeals affirmed the action of this District Court and the Bankruptcy Court.

We have reviewed the lengthy materials filed in this matter, including the appellants' brief, statements of the issues, and the transcripts of the proceedings before the Bankruptcy Court. Of course, we are familiar with the prior decision which was

used by the Bankruptcy Court as grounds for dismissal of this matter. Nevertheless, we made another review of that decision, as well as the divorce decree which has been made part of the record and which is a significant part of appellants' argument.

The prior decision was rendered in a bankruptcy and adversary proceeding involving the same parties. The issue was whether Karen Clemence and Lontie Clemence owned the same land at issue here by reason of a general warranty deed dated May 19, 1982 and signed by their mother, Bonnie Clemence, and their father, Roy Clemence. This court adopted the following findings of the Bankruptcy Judge:

> The transfer of the real estate of Karen and Lontie on May 19, 1982 was not an effective gift, because it lacked, and Karen and Lontie failed to prove, the requisite elements of a gift. Even if the burden of proof in this case was on Roy and the creditors, as Karen and Lontie argue, the Court would hold that Roy and the creditors have provided that a valid gift was not made. The Court holds there was no intent to make a transfer, nor was there an effective transfer before June 10, 1982. At that point, Bonnie was

> enjoined from transferring the property in any manner by the restraining order issued by the state court judge in the domestic relations actions. Accordingly, the Court holds that the owner of the real estate is the Bonnie Clemence Trust and not the debtors in this chapter 11 proceeding, Karen and Lontie Clemence. The Court makes no determination of the allegations of diminished capacity of Roy, fraud perpetrated on Roy, nor undue influence exercised to Roy's detriment. By this Court's holding today, the property is returned to the jurisdiction of the state court to be divided in the divorce proceeding pursuant to the state court's authority, in light of the agreements, wills and trusts since 1954, the statutory and case law factors, and in light of the allegations made by Roy.

Before this court adopted the above findings and while the adversary proceedings were pending, a state court in the divorce case between Roy and Bonnie Clemence issued an order dividing property so that certain land would go to Roy Clemence on the condition described as follows:

> "subject . . . to the final determination yet to be made by the United States Bankruptcy Court for the District of Kansas concerning the validity of a certain deed executed on the 19th day of May,

> 1982, by the parties as Trustees of the Bonnie J. Clemence Trust purporting to convey to Karen K. Clemence and Lontie J. Clemence certain tracts of land . . . Should the aforesaid deed be finally determined to be invalid it is the finding of this Court that the ownership of all lands described therein . . . should be set over to [Roy Clemence] . . . "

Appellants contend that this court never decided that the deed was invalid, and therefore Roy Clemence cannot claim ownership of the lands described in the deed. While the court did not explicitly state that the deed was invalid, the court held the deed was ineffective (or invalid) to transfer interest in the land to Karen and Lontie Clemence because there was an absence of donative intent, delivery and acceptance--the essential elements of a gift. This holding satisfied the condition in the divorce decree because it established the ownership of the land at the time of the decree.

Hence, applicants' claim in this proceeding that the divorce decree bars Roy Clemence's claim to the land has already been

decided by the operation of this court's decision and the divorce decree. This court held that the land belonged to the Bonnie Clemence Trust. The divorce decree then placed the land in Roy Clemence's ownership. The Bankruptcy Court was correct in making this purely legal determination upon a motion to dismiss.

The dismissal of the adversary proceeding is affirmed. This action is taken upon a full consideration of the matters filed before this court -- not as a summary action upon appellees' motion. A copy of this order shall be transmitted to the Clerk of the Bankruptcy Court.

IT IS SO ORDERED.

Dated this 12th day of January, 1990 at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE LONTIE J. CLEMENCE and KAREN K. CLEMENCE, Individually and in their severable capacities as stock- holders of and trustees for "THE BONNIE J. CLEMENCE TRUST UTA 7/25/84"; BONNIE J. CLEMENCE, individually and in her capacity as stockholder of "The Bonnie J. Clements Trust, UTA 7/25/84, Plaintiffs-Appellants, v. ROY ARTHUR CLEMENCE, conservatee/debtor; CHARLES R. CLEMENCE and R. DOUGLAS CLEMENCE, co-conservators for Roy A. Clemence, Defendants-Appellees.	)	No. 90-3049 D.C. No. 86-4091-R) (D. Kansas)

ORDER AND JUDGMENT*

Before **MCKAY**, **MOORE** and **BRORBY**, Circuit Judges.

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This is an appeal from a judgment of the District Court of the District of Kansas sitting as an appellate court in bankruptcy. The sole issue is whether the bankruptcy court correctly dismissed an adversary proceeding brought to determine whether 5000 acres of real property was that of the plaintiffs or that of the estate. The district court upheld the bankruptcy judgment that the issue had been resolved in prior actions, and we affirm the district court.

Plaintiff, Bonnie J. Clemence, is the mother of plaintiffs Lontie J. Clemence and Karen K. Clemence. Roy Clemence, whose bankruptcy estate is a party defendant in this action, was the husband of Bonnie and the

father of Lontie and Karen. The dispute here is whether Lontie and Karen are the owners of the real property as a result of a deed from Bonnie to them.

Bonnie executed a general warranty deed to Lontie and Karen dated May 19, 1982, purporting to convey the 5000 acres to them as a gift. The deed was not recorded until April 25, 1983. In the intervening period, a number of consequential events occurred.

First, and perhaps most important in the chain of events, in June 1982, Roy filed an action in state court first seeking separate maintenance and later a divorce from Bonnie. From what we can glean of the prolix briefs and the record, there is no dispute that the state court had jurisdiction over the properties of Roy and Bonnie and had authority to allocate their interests in those properties in accordance with state law.

Thereafter, on April 18, 1983, Lontie and Karen filed a chapter 11 proceeding in the District of Kansas. In that proceeding, the

bankruptcy judge ultimately determined that Bonnie did not have donative intent to convey the property to Lontie and Karen when she executed the deed. He consequently held there was no "effective transfer before June 10, 1982," the date the state court acquired jurisdiction in the action between Roy and Bonnie.[1] He concluded the property was owned by "the Bonnie Clemence Trust and not the debtors [Lontie and Karen] in this chapter 11 proceeding." (Emphasis added.) The court then returned the property "to the jurisdiction of the state court to be divided in the divorce proceeding pursuant to the state court's authority." That judgment was appealed to the district court, which affirmed the bankruptcy court, and to this court which summarily affirmed the district court.

After the entry of the judgment of the bankruptcy court, the state court entered a

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[1]The date is further significant because from that time Bonnie had been enjoined by the state court from conveying any interests in property.

decree of divorce. In that decree, the state court awarded the 5000 acres to Roy,

> subject, however, to the final determination yet to be made by the United States Bankruptcy Court for the District of Kansas concerning the validity of a certain deed executed on the 19th day of May, 1982, by the parties as Trustees of the Bonnie J. Clemence Trust purporting to convey to Karen K. Clemence and Lontie J. Clemence certain tracts of land situated in Dickinson County and Ottawa County, Kansas . . . . Should the aforesaid deed be finally determined to be invalid it is the finding of this Court that the ownership of all lands described therein as well as the other lands described . . . should be set over to the Plaintiff [Roy] as his sole and separate property, free and clear of all claims of the Defendant. Should said deed be finally determined to be valid then this finding shall have no bearing on the lands described therein.

It is not clear in the record before us, but we presume at the time of the decree the state court was unaware of the judgment of the bankruptcy court holding the purported transfer to Lontie and Karen ineffective. We have no doubt, however, that the state court intended to defer to the bankruptcy court's

determination of whether Bonnie's deed effectively conveyed the 5000 acres to Karen and Lontie. We are equally certain that the state court intended to award the 5000 acres to Roy if the bankruptcy court held that transfer ineffective.

Succeeding the entry of the divorce decree by some eight months, Roy filed the bankruptcy proceeding from which this appeal emerged. In that proceeding, plaintiffs filed a pro se complaint, individually as "as fairly representative of the body of 'Stockholders' of the Bonnie J. Clemence Trust" seeking a declaratory judgment that the 5000 acres "do not constitute property of [Roy's bankruptcy] estate - unless and until the said deed be adjudicated to be invalid as to Bonnie." Again, while the prolixity of the complaint obscures the clarity of its purpose, it appears that plaintiffs contended that because the bankruptcy court did not pronounce the word "invalid" when it held the purported conveyance from Bonnie to Lontie and Karen

"ineffective," the divorce decree operated to vest title in the 5000 acres in Bonnie.[2]

Roy, as debtor, filed a motion to dismiss the complaint for failure to state a claim. Roy asserted the issue of the validity of the deed had been resolved against Karen and Lontie, and that holding was binding. After hearing the motion the bankruptcy court concluded the issues "have already been determined by this Court and therefore are barred by res judicata and collateral estoppel." The motion to dismiss was granted.

On appeal, the district court affirmed. The court held that contrary to plaintiffs' assertion, it did determine Bonnie's deed invalid. The court stated:

> While the court did not explicitly state that the deed was invalid, the

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[2]Plaintiffs attempted to file an amended complaint asserting that the first bankruptcy holding was invalid because the bankruptcy court did not have "in personam jurisdiction" over Bonnie, but the bankruptcy court did not permit the filing of the amended complaint. Consequently, the argument apparently raised in this court concerning the issue of "in personam jurisdiction" is without foundation.

court held the deed was ineffective (or invalid) to transfer interest in the land to Karen and Lontie Clemence because there was an absence of donative intent, delivery and acceptance -- the essential elements of a gift. This holding satisfied the condition in the divorce decree because it established the ownership of the land at the time of the decree.

We agree with this ruling. Plaintiffs' contention is utterly frivolous.

AFFIRMED. Mandate shall issue forthwith.

Entered for the Court

John P. Moore
Circuit Judge